

SEP 21 1979

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1979

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No. 79-185

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CONSUMERS UNION OF UNITED STATES, INC.  
and  
VIRGINIA CITIZENS CONSUMER COUNCIL,  
*Appellants,*

v.

VIRGINIA STATE BAR, et al.,  
*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

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**BRIEF OPPOSING MOTION TO AFFIRM**

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**I. Good Faith is Not a "Special Circumstance" That  
Defeats a Section 1988 Award.**

Appellees argue that because they acted in good faith there exists a special circumstance that justifies denying appellants reimbursement under 42 U.S.C. Section 1988.<sup>1</sup> However,

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<sup>1</sup> Motion to Affirm at 6.

Congress has abolished good faith immunity from Section 1988 awards. *Hutto v. Finney*, 437 U.S. 678, 699 n.32 (1978); *Brown v. Culpepper*, 559 F.2d 274, 278 (1977).<sup>2</sup> It has determined that the intent of persons who violate constitutional rights — and force plaintiffs to incur litigation expenses to defend those rights — does not affect plaintiffs' entitlement to reimbursement under Section 1988. *Id.* Congress provided for such reimbursement to encourage individuals to protect their constitutional rights from infringement, even by allegedly well-intentioned government entities.

Although the district court opinion correctly observed that good faith is not a defense to Section 1988 liabilities, the court nonetheless resurrected that defense by finding that appellees' good faith has created a "special circumstance" that renders a fee award unjust.<sup>3</sup> If good faith cannot defeat a Section 1988 award, the guise of a rubric such as "special circumstances" cannot recreate the good faith defense. To find otherwise would subvert Congress' intent to abolish this governmental immunity and to establish incentives for private parties to vindicate congressional policies of the highest priority. Thus the correctness of

<sup>2</sup> H.R. Rep. No. 1558, 94th Cong., 2d Sess. 9 (1976) notes disapprovingly that "in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy," citing *Wood v. Strickland*, 420 U.S. 308 (1975) and *Scheuer v. Rhodes*, 416 U.S. 232 (1974), two cases upholding the doctrine of good faith immunity in damage actions. After observing that fee awards in these cases are necessary to assure that certain constitutional rights are adequately protected, the House Report concluded that those immunity doctrines and special defenses will not undermine awards under Section 1988. H.R. Rep. No. 1558, *supra*. See also S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976).

<sup>3</sup> Jurisdictional Statement at 12-13.

the district court's decision raises a substantial question that deserves plenary consideration by this Court.

## II. If the Virginia Supreme Court is Found Not to Be Liable, the District Court's Decision Regarding the Virginia Bar's Liability Should Be Vacated and Remanded.

If this Court decides to hear the Virginia Supreme Court's appeal, jurisdiction should be noted over this cross appeal so that, if the Virginia Supreme Court is relieved of liability for fees and costs, this Court may reverse, or vacate and remand, the district court decision that an award against the State Bar would be unjust. That finding of injustice was preciated on the district court's belief that appellants would be compensated by the Virginia Court. However, if the Virginia Court does not reimburse appellants, the conflicting equities as to whether an award against the Bar is manifestly unjust become weighted even more heavily in favor of such an award.

Appellees brought this case as private attorneys general to secure significant first amendment rights to gather and publish information on legal services.<sup>4</sup> Such important public interest litigation is precisely the sort of litigation Congress intended to encourage through Section 1988 awards.<sup>5</sup> Moreover, this litigation was necessitated by the actions of the Virginia Bar. It was the Bar which proposed and enforced the unconstitutional Rule and advised attorneys they would not participate in appellants' directory. The Bar's allegation that it acted in good faith and attempted to

<sup>4</sup> See S. Rep. No. 94-1011, *supra* at 2-5; H. Rep. No. 94-1558, *supra* at 1-5.

<sup>5</sup> *Id.*

amend the Rule — long after this suit was brought — does not justify withholding reimbursement from appellants. Quite to the contrary, to deny appellants reimbursement for their litigation expenses because of the Bar's asserted, but questionable, good faith, would be manifestly unjust.

### CONCLUSION

Therefore, if this Court notes jurisdiction over the Virginia Court's appeal, the Court should similarly note jurisdiction over this cross appeal to resolve the substantial question raised and to preserve its option to vacate and remand the district court's decision on the Virginia Bar's liabilities.

Respectfully submitted,

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